92-1719

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL BOURGAL, JOHN PROBEYAHN, BEN CIAVOLELLA, JR., IANIELLO MADONNA, THEODORE KING, CHESTER BROMAN, FRANK FINKEL and JOSEPH FERRARA as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Petitioners,

—against—

SALVATORE CERVONI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE S. FRIEDMAN
Counsel of Record

Jay P. Levy-Warren
Mary M. Dickman
FRIEDMAN & LEVY-WARREN
1500 Broadway, Suite 2303
New York, New York 10036
(212) 354-4500

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QUESTION PRESENTED FOR REVIEW

Is the sole shareholder, officer, and director of a corporate employer who acts indirectly in that employer's interest in relation to an employee benefit plan and causes that employer to violate 29 U.S.C. §1145 by not making contributions to that plan individually liable for such conduct?

LIST OF PARTIES

The parties to the proceedings in the district court were two of the Trustees and fiduciaries of the Local 282 Welfare, Pension, and Annuity Trust Funds, Salvatore Cervoni and Key Way Concrete Supply Corp. At the time of the original filing, the two named Trustees were Robert Sasso and Theodore King; all of the present Trustees are listed in the caption of the petition. Salvatore Cervoni, the sole shareholder, officer and director of Key Way Concrete Supply Corp., was the sole Defendant in the proceedings before the Second Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
A. By Its Language and Structure, Subchapter I of ERISA Requires a Person Who Acts Indirectly in the Interest of a Direct Employer to Comply with All of the Direct Employer's Subchapter I Obligations	10
B. The Issue Presented Is One of National Importance for All Multiemployer Employee Benefit Plans and Employers That Contribute to Those Plans	20

CONCLUSION

APPENDIX A:
OPINIONS AND JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT A-1

APPENDIX B:
ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED AUGUST 6, 1991 B-1

APPENDIX C:
ORDER ADOPTING AND MODIFYING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE AND REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE C-1

TABLE OF AUTHORITIES

Cases	Page
Alessi v. Raybestos - Manhattan, Inc., 451 U.S. 504 (1981)	10, 16, 22
Alman v. George Manuf. Corp., 680 F.Supp. 56 (D.Mass. 1988), cert. denied, 489 U.S. 1039 (1989)	16
Burris v. Bozzay Roadrunner Service, Inc., 651 F. Supp. 36 (E.D. Mo. 1986)	15
Chambers Const. Co. v. Mitchell, 233 F.2d 717 (8th Cir. 1956)	14
Conroy v. Aniskoff, ___ U.S. ___, ___ S.Ct. ___, 123 L.Ed.2d 229, 61 U.S.L.W. 4301 (March 31, 1993)	16
Divine v. Levy, 36 F. Supp. 55 (W.D. La. 1940)	14
Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991)	14, 19
Dole v. Solid Waste Services, Inc., 733 F. Supp. 895 (E.D. Pa. 1989), aff'd without op., 897 F.2d 521, cert. denied, 497 U.S. 1024 (1990)	15
Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983)	15, 19

TABLE OF AUTHORITIES
(continued)

	Page
Donovan v. Sabine Irrigation Co., Inc., 695 F. 2d 190 (5th Cir.), cert. denied sub nom Alberding v. Donovan, 463 U.S. 1207 (1983)	14, 19
Donovan v. Sovereign Security, Ltd., 726 F.2d 55 (2d Cir. 1984)	15
Fortuna Broom Co. v. Wirtz, 379 F.2d 327 (5th Cir. 1967)	14
Gambino v. Index Sales Corp., 673 F. Supp. 1450 (N.D. Ill. 1987)	9
Goldberg v. Saf-T-Clean, Inc., 209 F. Supp. 343 (S.D. Fla 1962)	14
Gusdonovich v. Business Information Co., 705 F. Supp. 262 (W.D. Pa. 1985)	15
Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972)	14, 19
Hodgson v. Royal Crown Bottling Co., 324 F. Supp. 342 (N.D. Miss. 1970), aff'd, 465 F.2d 473 (5th Cir 1972)	14

TABLE OF AUTHORITIES
(continued)

	Page
International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988)	16
Laborers Pension Fund v. Bakke Construction Co., Inc., 1987 U.S. Dist. LEXIS 10509 (N.D. Ill. Nov. 9, 1987)	9
Laborers Health and Welfare Trust Fund of Northern California v. Advanced Lightweight Concrete Co., 484 U.S.539 (1988)	9, 13
Massachusetts State Carpenters Pension Fund v. Atlantic Diving Co., Inc., 635 F. Supp. 9 (D. Mass. 1984)	10
Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988)	12, 14, 16
Morales v. Trans World Airlines, Inc., ___ U.S. ___, 112 S.Ct. 570 (1992)	15, 18
Nachman v. PBGC, 446 U.S. 359 (1980)	16, 22
Patel v. Wargo, 803 F.2d 632 (11th Cir. 1986)	14, 19

TABLE OF AUTHORITIES
(continued)

	Page
Patterson v. Shumate, ___ U.S. ___, 112 S. Ct. 2242 (1992)	17
Pipe Fitters Health & Welfare Trust v. Waldo, R., Inc., 872 F.2d 815, cert. denied, 493 U.S. 977 (1989), appeal after remand, 969 F.2d 718 (8th Cir. 1992), cert. denied sub nom. Pipe Fitters Pension Trust v. Waldo, 113 S.Ct. 981 (1993)	16
Plumbers Pension Fund, Local 130 V.A. v. Neidrich, 891 F.2d 1297 (7th Cir. 1989)	16
Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989), cert. denied, 495 U.S. 930 (1990)	16
Rubenstein v. Tri-State Transport, Inc., 646 F. Supp. 1 (D. Mass. 1984)	10
Sasso v. Aries Striping, Inc., CV-89-4248 (E.D.N.Y. Mar. 6, 1991)	9
Scarbrough v. Perez, 870 F.2d 1079 (6th Cir. 1989)	16
Shultz v. Chalk-Fitzgerald Construction Co., 309 F. Supp. 1255 (D. Mass. 1970)	14

TABLE OF AUTHORITIES
(continued)

	Page
Solomon v. Klein, 770 F.2d 352 (3d Cir. 1985)	16
Trustees of the Amalgamated Insurance Fund v. Danin, 648 F. Supp. 1142 (D. Mass. 1986)	9
United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487 (2d Cir. 1960)	14
United States v. Stanley, 416 F.2d 317 (2d Cir. 1969)	14
West Virginia Ohio Valley Areas IBEW Welfare Fund v. Ball Electric Company, Inc., 685 F.Supp. 953 (S.D. W.Va. 1988)	9
Wirtz v. Pure Ice Co., 322 F.2d 259 (8th Cir. 1963)	14, 19
Statutes	
Employee Polygraph Protection Act 29 U.S.C. §2001(2)	14
Employee Retirement Income Security Act 29 U.S.C. §1002(5)	Passim
29 U.S.C. §1002(9)	11

TABLE OF AUTHORITIES
(continued)

	Page
29 U.S.C. §1052	21
29 U.S.C. §1053	21
29 U.S.C. §1059(a)(1)	11
29 U.S.C. §1082	11
29 U.S.C. §1132	21
29 U.S.C. §1145	Passim
29 U.S.C. §1322(a)	21
Fair Labor Standards Act 29 U.S.C. §203(d)	13
Family and Medical Leave Act of 1993, Pub. L. 103-03, § 107(4)(a)(ii)(I), 107 Stat. 6	14
Internal Revenue Code 26 U.S.C. §§ 401(a)(5), (k), (l)	21
Multiemployer Pension Plan Amendments Act, Pub. L. 36-45, 94 Stat. 1295 (1980)	10, 11

TABLE OF AUTHORITIES
(continued)

	Page
Welfare and Pension Plan Disclosure Act, Pub. L. 85-836, § 3(a), superseded by Pub. L. 93-406, § 111(a)(1), 88 Stat. 829 (1974)	14
Regulations	
IRS Final and Temporary Regulation §1.401-1(b)(1)(i), (ii)	21
IRS General Counsel Memo 39271, Aug. 14, 1984	21

IN THE

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OCTOBER TERM, 1992

No. _____

MICHAEL BOURGAL, JOHN PROBEYAHN, BEN CIAVOLELLA, JR., IANIELLO MADONNA, THEODORE KING, CHESTER BROMAN, FRANK FINKEL and JOSEPH FERRARA as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Petitioners,

- against -

SALVATORE CERVONI,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioners, Michael Bourgal, John Probeyahn, Ben Ciavolella, Jr., Theodore King, Chester Broman, Frank Finkel, Joseph Ferrara and Ianiello Madonna as Trustees and

Fiduciaries of the Local 282 Welfare, Pension, and Annuity Trust Funds ("Funds"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit dismissing the action against the respondent Salvatore Cervoni ("Cervoni") for non-payment of contributions owed by Key Way Concrete Supply Corp. ("Key Way") to the Funds.

OPINIONS BELOW

The final opinion and prior remand order of the Court of Appeals for the Second Circuit are reprinted in Appendix A. The original Order of the United States District Court for the Eastern District of New York (Mishler, J.) is reprinted in Appendix B. The Report and Recommendation of the Magistrate Judge and Order of the District Court adopting and modifying that Report, are reprinted in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered January 25, 1993. The jurisdiction of this Court to review the judgment of the court of appeals by writ of certiorari is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based on 29 U.S.C. §§ 301 and 1132.

STATUTES INVOLVED

Section 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1145, states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 3(5) of ERISA, 29 U.S.C. §1002(5), states:

> The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

Section 3(9) of ERISA, 29 U.S.C. §1002(9), states:

> The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

STATEMENT OF THE CASE

Petitioners challenge the holding of the court below that the sole shareholder and corporate officer who exercised complete control over the day-to-day operations of a corporation that had a contractual obligation to contribute to multiemployer benefit plans, who acted indirectly in the interest of that corporation in relation to those plans, and who thereby caused that corporation not to make those contributions, is not liable for such conduct under 29 U.S.C. §§1002(5) and 1145.

The plaintiffs and petitioners are trustees and fiduciaries of three multiemployer benefit plans: the Local 282 Pension Trust Fund, the Local 282 Welfare Trust Fund and the Local 282 Annuity Trust Fund ("the Funds"). Pursuant to a collective bargaining agreement between Building Material Teamsters Local 282 ("Local 282") and Key Way Concrete Supply Corp. ("Key Way"), Key Way was obligated to make contributions to the Funds on a monthly basis for hours paid to its drivers at the rates specified in the collective bargaining agreement. Key Way became delinquent in making those contributions, and the Trustees sued Key Way and its sole shareholder, director and corporate officer, Salvatore Cervoni, to collect the unpaid contributions.

The district court, in a Memorandum Decision and Order dated August 6, 1991, ordered that judgment be entered against Key Way for its failure to pay any contributions for the months of December 1989 through December 1990 in the undisputed amount of $346,935.89, plus interest and liquidated damages pursuant to 29 U.S.C. §1132(g)(2), for a total of $462,904.94. The court also held

that Cervoni was an "employer," as that term is defined in 29 U.S.C. §1002(5), by reason of his being "the corporate official of Key Way with operational control who is directly responsible for the failure to make the payments required by the statute," and was therefore liable along with Key Way for all amounts owed to the Funds. B - 5. Key Way filed a bankruptcy petition in October 1991.

Only Cervoni appealed from the judgment. The Second Circuit remanded to the district court for additional findings of fact concerning the payments made by Key Way in 1989 and 1990, and the "dates and amounts of such payments, the person or entity making such payments, the reason or reasons why such payments ceased, and Cervoni's role in the decision to halt payments and his motivation for his actions." A - 8. After a hearing before a magistrate judge, the parties submitted stipulations and proposed findings of fact. The magistrate judge issued a Report and Recommendation making the findings requested by the Second Circuit, which, after timely objections were made, was substantially adopted by the district court with two modifications in a decision dated August 11, 1992.

The Second Circuit, without further briefing or argument, then reversed the district court's entry of judgment against Cervoni, and entered judgment against plaintiffs, even though the defendants had not moved for summary judgment. The court first held that 29 U.S.C. §1145 does not create liability on the part of a person who is not contractually obligated to make contributions to an employee benefit plan. A - 3-4. The Court then determined that the record did not present the type of "special circumstances" that it believed necessary to hold Cervoni liable for Key Way's failure to make contributions. Id. at 4.

The Report and Recommendation, as modified, had found that in 1989 and 1990, Cervoni was the sole shareholder, director and officer of three corporations which constituted a concrete manufacturing and delivery business: Key Way, Long Island West (LIW) and Riverhead Transit Mix (Riverhead). C - 5-6. Riverhead manufactured and predominantly delivered concrete to customers in eastern Suffolk County; LIW manufactured and predominantly delivered concrete to customers in western Suffolk, Nassau and Queens counties; and Key Way solely existed to supply drivers to Riverhead and LIW. C - 3-5.

Key Way did not manufacture or deliver concrete, and its total income was received from Riverhead and LIW for supplying drivers to those companies. C - 3-4. Key Way has never owned any assets, or received any capital contributions from Cervoni, at any time since its incorporation. C - 4.

Key Way made payments to the Local 282 Funds for work performed through November, 1989. C- 11-12, 16-17. After the checks for December 1989 and January 1990 were dishonored, in late April and early May 1990, respectively, Key Way continued to operate and report contributions owed for hours worked in covered employment through December, 1990, as follows (id.):

April	$26,938.19
May	$42,977.38
June	$40,268.03
July	$38,228.30
August	$41,271.20
September	$31,436.96
October	$38,800.87
November	$28,363.60

December..... $18,391.36

TOTAL $306,675.89

In 1989 and 1990, Riverhead and LIW had difficulty in collecting payments for the concrete they manufactured and delivered. C - 8-9. Nevertheless, the companies continued in operation: Riverhead did not file for bankruptcy until July 15, 1991; LIW and Key Way did not file for bankruptcy until October, 1991. C - 5. In these circumstances, "Cervoni decided to use Riverhead's available funds to 'make payroll' and 'buy cement and other material to keep running,'" rather than transfer a portion of those available funds to Key Way to make payments to the Local 282 Funds." C - 8. Cervoni also loaned money ($263,000) to Riverhead and Key Way in 1989 and 1990 to enable the companies to meet their expenses (other than benefit fund obligations). C - 6. Cervoni decided which company would receive the loans. C - 7. Cervoni caused Riverhead to repay him $50,000 of these loans in 1989 and 1990, with $16,857.17 in repayments in the period August 1990 through December 1990 when Key Way was continuing to operate but had ceased making payments to the Funds. C -10. "Cervoni made the decision to use Riverhead's available funds to make loan repayments to himself rather than transfer the money to Key Way to pay outstanding obligations to the Local 282 Funds." C - 10.

Cervoni was "the person who negotiated with Local 282 and dealt with the Local 282 Funds on behalf of Key Way." C - 4. Cervoni completely managed and controlled the operations of Key Way and directed its day-to-day affairs. C - 4, 14. He was authorized to sign and signed all Key Way checks. C - 3. It was Cervoni's decision to continue Key Way in operation between April 1990 and

December 1990 when insufficient funds were available to pay the Local 282 Funds for the benefits accruing to drivers who continued to work during that period. C - 10.

Given that Key Way had no assets and that Riverhead and LIW had experienced substantial problems in collecting receivables and paying for essential supplies, Cervoni had to have been aware by at least April 1990 that Key Way could not pay its ever increasing debts to the Funds. Nevertheless, in the period between April 1990 and December 1990, Cervoni decided to use Key Way's limited funds to pay wages and current payroll taxes, and to make certain other payments, rather than to make any payments to the Local 282 Funds. C - 8-14. These other payments included $28,247 in payments to another union's welfare fund to provide health insurance coverage for Cervoni and three individuals who were neither employees nor officers of Key Way, and $70,000 in delinquent payroll tax obligations owed to the Internal Revenue Service. C - 13-14.

Thus, the record demonstrates that Cervoni acted in the interest of Key Way in relation to the Local 282 Funds, and from at least April 1990 through December 1990, caused Key Way's violations of 29 U.S.C. §1145 by employing drivers for whom Key Way was contractually obligated to make contributions to the Funds, when there was no reasonable likelihood of Key Way's ever being able to make those payments, and by not using any of Key Way's available funds to make payments to the Funds in this period.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law, concerning the construction of 29 U.S.C. §1145, which requires resolution by this Court. The court below held that the portion of the ERISA Subchapter I definition of "employer" that refers to "any person acting... indirectly in the interest of an employer, in relation to an employee benefit plan," 29 U.S.C. §1002(5), does not apply to the ERISA Subchapter I obligation of an "employer" to make contractually required contributions to multiemployer benefit plans pursuant to 29 U.S.C. §1145.

This decision nullifies the choice made by Congress in enacting 29 U.S.C. §1145 as an amendment to Subchapter I of ERISA without modifying the Subchapter I definition of "employer," and utterly fails to give effect to the plain language of 29 U.S.C. §1002(5) and the decision of this Court in Laborers Health and Welfare Trust Fund of Northern California v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988), construing 29 U.S.C. §1145. The Second Circuit decision, which joins the six other courts of appeals to have addressed this issue,[1] will inevitably result in

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[1]These decisions are cited infra at 17. West Virginia Ohio Valley Areas IBEW Welfare Fund v. Ball Electric Company, Inc., 685 F.Supp. 953 (S.D. W.Va. 1988), is the sole remaining district court decision holding that shareholders or corporate officers may be liable for the corporation's violations of 29 U.S.C. §1145. Numerous district court decisions supporting this holding were subsequently rejected by these courts of appeals decisions. See, e.g., Sasso v. Aries Striping, Inc., CV-89-4248 (E.D.N.Y. Mar. 6, 1991); Gambino v. Index Sales Corp., 673 F. Supp. 1450 (N.D. Ill. 1987); Laborers Pension Fund v. Bakke Construction Co., Inc., 1987 U.S. Dist. LEXIS 10509 (N.D. Ill. Nov. 9, 1987); Trustees of the Amalgamated

shifting the risks and costs of funding multiemployer retirement plans from under-capitalized contributing employers to the participants in the plans, contributing employers that comply with their statutory obligations, and, possibly, the Pension Benefit Guaranty Corporation ("PBGC"), contrary to the balance struck by Congress in enacting ERISA and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1295. For these reasons, as explicated below, this Court should issue a writ of certiorari to review the decision of the Second Circuit Court of Appeals.

A. By Its Language and Structure, Subchapter I of ERISA Requires A Person Who Acts Indirectly in the Interest of a Direct Employer to Comply with All of the Direct Employer's Subchapter I Obligations

In enacting ERISA in 1974, Congress created certain obligations on the part of employers that had promised to provide retirement and health insurance benefits to their employees. The primary purpose of Subchapter I of ERISA was to set minimum requirements for employee benefit plans in order to assure that whatever retirement income had been promised by an employer to an employee would actually be paid when an employee retires. See Alessi v. Raybestos - Manhattan, Inc., 451 U.S. 504, 510 (1981).

Insurance Fund v. Danin, 648 F. Supp. 1142 (D. Mass. 1986); Rubenstein v. Tri-State Transport, Inc., 646 F. Supp. 1 (D. Mass. 1984); Massachusetts State Carpenters Pension Fund v. Atlantic Diving Co., Inc., 635 F. Supp. 9 (D. Mass. 1984).

Congress expressly defined the term "employer" for purposes of Subchapter I of ERISA as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan...," 29 U.S.C. §1002(5), and defined "person" to include "an individual," 29 U.S.C. §1002(9). The term employer as used in Subchapter I of ERISA thus has a two-fold meaning: it refers both to the entity "acting directly as an employer" (hereinafter, "direct employer") and to those officers, employees or other agents of the direct employer who act "indirectly in the interest" of that employer "in relation to an employee benefit plan."

By adding the phrase "indirectly in the interest of an employer" to the definition of employer, Congress reached a direct employer's agents who act in relation to an employee benefit plan and required them to comply with the direct employer's Subchapter I obligations to that plan. For instance, the Subchapter I requirement that "every employer" maintain employee records sufficient to determine the benefits due to its employees, 29 U.S.C. §1059(a)(1), requires both the direct employer and the employer's agents who are responsible for dealing with the plan to maintain those records. See also 29 U.S.C. §1082(c)(11)(A) (funding obligations of single employer retirement plans "shall be paid by the employer responsible for contributing to or under the plan the amount described in subsection (b)(3)(A) of this section").

As part of the Multiemployer Pension Plan Amendments Act ("MPPAA") of 1980, Pub.L. 96-364, 94 Stat. 1295, Congress amended Subchapter I of ERISA to create the statutory obligation for employers to contribute to multiemployer plans that is at issue in this case:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. §1145. By its inclusion of this provision in Subchapter I, and its use of the term "employer" without any modification of the Subchapter I definition of that term, Congress imposed the same responsibility on individuals "acting... indirectly in the interests of an employer" with respect to this new "employer" obligation as it had imposed in its original enactment of Subchapter I of ERISA.

The court below declined to give §1002(5) the same meaning and effect in §1145 as it would have in the rest of Subchapter I of ERISA. The court, and the decision in Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23, 25-26 (1st Cir. 1988), on which it relied, reasoned that the phrase "who is obligated to make contributions" in 29 U.S.C. § 1145 modifies the term "employer" so as to limit the application of the phrase "indirectly in the interest of an employer" to only those persons who both act "indirectly in the interest of an employer" and who have an independent contractual obligation to contribute to an employee beneift plan. This is not only a strained construction of both §1002(5) and §1145, but it also renders the phrase "indirectly in the interest of an employer" meaningless as applied to Subchapter I as originally enacted: if an indirect employer is only liable to the extent that there is an independent ground for his legal obligations to the plan, there is no reason to include the reference to a person acting "indirectly in the interest of an

employer" in 29 U.S.C. §1002(5).

Moreover, this reading of §1145 is inconsistent with this Court's decision in Laborers Health and Welfare Fund of Northern California v.Advanced Lightweight Concrete Co., 484 U.S. 539, 546-549 (1988), which held that the phrase "employer who is obligated to make contributions" describes the distinction between an employer's contractual obligation to contribute to an employee benefit plan and "a noncontractual obligation imposed by the NLRA. Statutory language that has been used by Congress to distinguish between a direct employer's contractual and noncontractual obligations cannot also be read to create a different level of distinctions between a direct employer and those who act indirectly in the interests of a direct employer. In light of Advanced Lightweight Concrete, there is no statutory basis to restrict the application of 29 U.S.C. §1002(5) in construing 29 U.S.C. §1145. Accordingly, 29 U.S.C. §1145 must be read to create the same obligation on the part of an agent of a direct employer (which is contractually obligated to make contributions to the plan) to comply with that statutory requirement as that agent has to comply with the direct employer requirements created by ERISA when it was originally enacted.

That the "indirectly in the interest of an employer" portion of 29 U.S.C. §1002(5) means what it says is confirmed by the judicial construction of an identical phrase in the Fair Labor Standards Act ("FLSA") definition of employer.[2] When Congress defined the term "employer"

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[2]Section 3(d) of the FLSA, 29 U.S.C. §203(d), states: "Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee...." Section 3(d) of the FLSA was amended five months prior to the enactment of ERISA by P.L. 93-259, §6(a), 88 Stat. 58,

in ERISA in 1974, the phrase "indirectly in the interest of an employer" had only been used in the FLSA, 29 U.S.C. §203(d), and the Welfare and Pension Plan Disclosure Act ("WPPDA"), Pub.L. No. 85-836, §3(a)(4), 72 Stat. 997, 988 (1958), amended by Pub. L. No. 87-420, 76 Stat. 35 (1962), which was superseded by ERISA, Pub.L. No. 93-406 §111(a)(1), 88 Stat. 829, 951 (1974).[3] See Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d at 24. In decisions issued both before and after the enactment of ERISA, the lower federal courts have consistently held that an individual with actual control over a corporation's operations and employment practices who causes the corporation not to comply with the minimum wage or overtime obligations of the FLSA is individually liable for those violations.[4]

April 8, 1974.

[3]Since 1974, Congress has only used this language to define employer in two additional labor statutes: the Employee Polygraph Protection Act of 1988, 29 U.S.C. §2001(2), and the recently enacted Family and Medical Leave Act of 1993, P.L. 103-03, §107(4)(a)(ii)(I), 107 Stat. 6.

[4] Decisions prior to September 2, 1974: See Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972);Chambers Const. Co. v. Mitchell, 233 F.2d 717 (8th Cir. 1956); Wirtz v. Pure Ice Co., 322 F.2d 259 (8th Cir. 1963); Fortuna Broom Co. v. Wirtz, 379 F.2d 327 (5th Cir. 1967); United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487 (2d Cir. 1960); United States v. Stanley, 416 F.2d 317 (2d Cir. 1969); Divine v. Levy, 36 F. Supp. 55 (W.D. La. 1940); Goldberg v. Saf-T-Clean, Inc., 209 F. Supp. 343 (S.D. Fla 1962); Hodgson v. Royal Crown Bottling Co., 324 F. Supp. 342 (N.D. Miss. 1970), aff'd, 465 F.2d 473 (5th Cir 1972); Shultz v. Chalk-Fitzgerald Construction Co., 309 F. Supp. 1255 (D. Mass. 1970).

Decisions subsequent to September 2, 1974: See, e.g., Patel v. Wargo, 803 F.2d 632 (11th Cir. 1986); Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991); Donovan v. Sabine Irrigation Co., Inc., 695

Both the court below and the decision in Starrett Paving failed to give sufficient weight to the uniform judicial construction of the phrase "indirectly in the interest of an employer" in the FLSA definition of employer. In Morales v. Trans World Airlines, Inc., ___ U.S. ___, 112 S.Ct. 570 (1992), this Court recently held that its decisions construing the "key phrase, 'relating to'" in an earlier statute provided the appropriate standard for construing the "identical" language in a later enacted statute. In determining the scope of the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. §1305(a)(1), the Morales Court relied on decisions construing "the similarly worded pre-emption provision of the Employee Retirement Income Security Act of 1974 ...." 112 S. Ct. at 2037. "Since the relevant language of the ADA is identical [to ERISA], we think it is appropriate to adopt the same standard here...." Id. Similarily, in both the FLSA and ERISA, the key phrase "indirectly in the interest of an employer" appears in the definition section of employer, so that the standards developed in applying that phrase in the FLSA should be used in construing the identical language in ERISA.

The other courts of appeals decisions which have construed 29 U.S.C. § 1002(5) not to apply to 29

F. 2d 190 (5th Cir.), cert. denied sub nom Alberding v. Donovan, 463 U.S. 1207 (1983); Donovan v. Sovereign Security, Ltd., 726 F.2d 55 (2d Cir. 1984); Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983); Gusdonovich v. Business Information Co., 705 F. Supp. 262 (W.D. Pa. 1985); Dole v. Solid Waste Services, Inc., 733 F. Supp. 895 (E.D. Pa. 1989), aff'd without op., 897 F.2d 521, cert. denied, 497 U.S. 1024 (1990); Burris v. Bozzay Roadrunner Service, Inc., 651 F. Supp. 36 (E.D. Mo. 1986).

U.S.C. § 1145 have principally relied on the reasoning adopted by the court below, and other, equally erroneous, grounds: a concern that a literal reading of the statutory terms of ERISA could extend to any employee who had dealings with an employee benefit plan and thus produce results not intended by Congress; the absence of any legislative history referring to an intent to override the fundamental policy of limited corporate liability; and the different policy interests at stake under the FLSA and ERISA.[5]

The concern over the breadth of a literal reading of 29 U.S.C. §1002(5) is misplaced, for two reasons. First, by its terms, the statute requires elements of both authorization and causation as prerequisites for incurring individual liability. See, infra, at 23-24 and n.6. Second, "ERISA is a 'comprehensive and reticulated statute,' Alessi v. Raybestos-Manhattan, Inc., 451 U.S. at 510, (quoting Nachman v. PBGC, 446 U.S. 359, 361 (1980)) and, as such, its literal terms should be construed to embody "a deliberate policy judgment" unless there is no conceivable basis to believe that Congress intended that result. See, e.g., Conroy v. Aniskoff, __ U.S. __, __ S.Ct. __, 123 L.Ed.2d 229, 61

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[5] See e.g., Pipe Fitters Health & Welfare Trust v. Waldo, R., Inc., 872 F.2d 815, cert. denied, 493 U.S. 977 (1989), appeal after remand, 969 F.2d 718 (8th Cir. 1992), cert. denied sub nom. Pipe Fitters Pension Trust v. Waldo, 113 S.Ct. 981 (1993); International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988); Scarbrough v. Perez, 870 F.2d 1079 (6th Cir. 1989); Plumbers Pension Fund, Local 130 V.A. v. Neidrich, 891 F.2d 1297 (7th Cir. 1989); Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F. 2d 23 (1988); Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989), cert. denied, 495 U.S. 930 (1990); Solomon v. Klein, 770 F.2d 352 (3d Cir. 1985). See also Alman v. George Manuf. Corp., 680 F.Supp. 56 (D.Mass. 1988), cert. denied, 489 U.S. 1039 (1989).

U.S.L.W. 4301, 4302-4303 (March 31, 1993) (rejecting contention that "a literal interpretation [of 50 U.S.C. §525] produces illogical and absurd results," in light of the history of "carefully reticulated statute" [Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. §501 et seq.], assumed congressional awareness of the judicial construction of prior servicemen enactments, and rational policy basis for the "absolute protection" resulting from the literal interpretation). Similarly, the absence of legislative history supporting the literal terms of a statute cannot possibly justify judicial modification of statutory language. See, e.g., Patterson v. Shumate, ___ U.S. ___, 112 S. Ct. 2242, 2248 (1992) (deciding that a bankruptcy estate exclusion based on "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law," 11 U.S.C. §541(c)(2), includes ERISA restrictions on transfers, even though the legislative history only discusses state law spendthrift trusts and does not mention ERISA or other federal law restrictions).

Nor does the fact that Subchapter I of ERISA regulates employee benefit plans which are created and terminated at the discretion of employers, while the FLSA imposes mandatory wage obligations, provide any meaningful basis to distinguish between the FLSA and ERISA definitions of "employer." Under the FLSA, the decisions whether or not to hire employees, and the number of employees to be hired, are entirely discretionary. There is no reason to believe that those employer hiring decisions are any less likely to be affected by the scope of individual FLSA liability than the discretionary decision to establish or maintain employee benefit plans will be affected by individual ERISA liability. More fundamentally, a court's proper role is to give effect to the language Congress selected, rather than to expand or contract that language depending on the different

policy concerns at stake each time that language is used. See Morales v. TWA, supra (applying decisions construing preemption language in ERISA to Airline Deregulation Act without taking into account the different policies at stake in those very different statutory schemes).

Because the court below determined that the statutory definition of employer was inapplicable to 29 U.S.C. §1145, it did not finally decide the circumstances in which an individual acting indirectly in the interest of an employer would be liable for causing the direct employer not to comply with its statutory obligation to make contributions to employee benefit plans. Yet the court had previously indicated what it considered to be the appropriate factors in its remand order to the district court for additional findings of fact concerning: the payments made by Key Way in 1989 and 1990, the "dates and amounts of such payments, the person or entity making such payments, the reason or reasons why such payments ceased, and Cervoni's role in the decision to halt payments and his motivation for his actions." A - 8.

These factors indicate that for an individual to be liable as an indirect employer, that individual must both possess the authority to make direct employer decisions in relationship to the plan and cause the direct employer not to comply with its statutory obligations to the plan. This is based on the statutory language, which, by the use of the terms "acting ... in the interest of an employer in relation to an employee benefit plan," requires elements of both authorization and causation. This standard is also consistent with FLSA decisions finding individual liability for a

corporation's failure to comply with FLSA requirements.[6]

The record on remand demonstrates that Cervoni both acted as the sole agent of Key Way in relation to the Funds (C - 4), and exercised that authority to cause Key Way not to make payments to the Funds. C - 8-10,14. Cervoni directed and controlled Key Way's day-to-day affairs. C - 4,14. When his business experienced difficulty in collecting receivables in 1989 and 1990, Cervoni decided to use all available money (including personal loans) for the operating companies, and then transfer only the amounts necessary to meet Key Way's current payroll and payroll tax obligations and the expenses described below. C - 8-14. Key Way continued to operate in this manner from at least December 1989 through December 1990, incurring contribution obligations to the Funds without making any provision for paying for accruing employee benefits. C - 7-

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[6]See Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991) (officer and co-owner with spouse who had control over significant aspects of corporation's day-to-day operations liable for failure to pay overtime); Patel v. Wargo, 803 F.2d 632 (11th Cir. 1986) (officer, director and principal shareholder not involved in day-to-day operation of corporation, therefore not liable for minimum wage and overtime violations); Donovan v. Sabine Irrigation Co., Inc., 695 F. 2d 190 (5th Cir. 1983) (non-owner officer who controlled payroll, insurance and tax matters and provided corporation with money to meet its payroll liable for minimum wage and overtime violations); Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983) (officers, directors and owners active in corporate management, including employee compensation and day-to-day cash flow, who kept plant open knowing of company's inability to pay employees, liable for failure to pay minimum wages; Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972) (radio station owner whose sons managed station's day-to-day activities liable for corporation's violations of minimum wage, overtime and recordkeeping requirements); Wirtz v. Pure Ice Co., 322 F.2d 259 (8th Cir. 1963) (majority stockholder who neither hired employees nor set wages and hours not liable for unpaid minimum wages or overtime compensation).

10. Between April and December 1990 Cervoni used the limited Key Way funds available after paying current payroll and payroll taxes to repay $70,000 to the IRS for delinquent payroll taxes, and to pay $28,247 to provide health insurance coverage for himself and three individuals who were not employees or officers of Key Way. C - 11-14. Clearly, this record supports the district court's original conclusion that "[a]s the corporate officer of Key Way who is directly responsible for the failure to make the payments required by the statute [29 U.S.C. §1145], Cervoni is personally liable under Section 502 of ERISA, 29 U.S.C. §1132." B - 5.

B. The Issue Presented Is One of National Importance for All Multiemployer Employee Benefit Plans and Employers That Contribute to Those Plans

The plain language of 29 U.S.C. §1002(5) embodies a decision by Congress to make individuals who act in the interest of an employer responsible for compliance with ERISA obligations. All employee benefit plans covered by Subchapter I of ERISA and all employers which maintain or contribute to those plans will be affected by the Court's construction of that provision.

The specific issue presented by this case, individual liability for failure to comply with an employer's contribution obligations to multiemployer benefit plans, is also of national significance. The outcome is critical to the interests of multiemployer plans in adequately funding benefit obligations; the interests of the participants in those plans in receiving the benefits they have been promised; and the interests of those contributing employers which comply with their contractual obligations in minimizing the expense of

maintaining multiemployer benefit plans. Under governing ERISA and Internal Revenue Code provisions and regulations, pension and annuity fund benefits are earned and accrue to employees at the time work is performed, whether or not contributions are actually made for these hours worked in covered employment.[7] Ultimately, an employer's failure to make payments for work which is credited to employees for benefit accrual purposes must result in some combination of lower benefits for all participants and higher contribution rates for responsible contributing employers, and may result in increased PBGC benefit guarantee obligations for multiemployer pension plans.[8]

Congress was well aware, when it enacted MPPAA in 1980, of the effect of a decreasing contribution base on the employers who continue to contribute to multiemployer pension plans, the practical difficulties in collecting contributions owed to all multiemployer plans, and how these conditions adversely affect the likelihood of a participant's actually receiving retirement benefits. See generally Advanced Lightweight Concrete, 484 U.S. at 545-546. Congress comprehensively addressed these problems by adding 29 U.S.C. §§ 1132(g)(2) and 1145 to Subchapter I of ERISA to create more effective collection remedies, and by amending Subchapter III of ERISA to create withdrawal

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[7]29 U.S.C. §§ 1052(a)(3)(A),(C), 1053(a)(2)(A), (B); 26 U.S.C. §§ 401(a)(5),(k),(l); IRS Final and Temporary Regulation § 1.401-1(b)(1)(i),(ii); see IRS General Counsel Memo 39271, Aug. 14, 1984.

[8]The PBGC is statutorily bound to guarantee nonforfeitable benefits, up to specified limits, owed to participants in multiemployer defined benefit retirement plans that become insolvent or terminate. 29 U.S.C. § 1322a.

liability obligations to multiemployer pension plans. Id.

The courts of appeals have resisted the full implementation of this statutory scheme, which makes certain agents of a direct employer responsible for failing to comply with Subchapter I requirements, and have thereby upset the balance struck by Congress among the interests of plans, plan participants, contributing employers, and employers who fail to make contractually required contributions. The inevitable result of the decision below is to encourage payroll corporations (as in the instant case) or other corporations which lack substantial assets to continue to operate without making contribution payments during periods of economic distress, even if there is no reasonable prospect of ever being able to make payments for their increasing obligations to multiemployer plans. The enhanced remedies provided by 29 U.S.C. §1132(g)(2) and 1145 will be of little practical value, and will have no deterrent effect, in these circumstances. The decisions of the courts of appeals can only further shift the costs of maintaining defined benefit retirement plans onto responsible contributing employers, beyond the costs imposed by Congress in creating withdrawal liability; these decisions can only exacerbate the current crisis in funding health insurance benefits.

Only this Court can immediately rectify this situation, and effectuate a fundamental purpose of ERISA, "to ensure that 'if a worker has been promised a defined pension benefit upon retirement...he actually receives it,'" Alessi v. Raybestos-Manhattan, Inc., 451 U.S. at 510, (quoting Nachman v. PBGC, 446 U.S. 359, 375 (1980)), by giving effect to the plain language in 29 U.S.C. §§1002(5) and 1145 which makes an individual acting in the interest of an employer responsible for that employer's complying with its contractual obligation to contribute to an employee benefit

plan.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

Dated: New York, New York
April 23, 1993

Respectfully submitted,

Eugene S. Friedman
Counsel of Record

Jay P. Levy-Warren
Mary M. Dickman
FRIEDMAN & LEVY-WARREN
1500 Broadway, Suite 2303
New York, NY 10036
(212) 354-4500

APPENDIX A, Part 1

Decision on appeal of January 25, 1993

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 640 -- August Term 1991

Argued: December 11, 1991
Decided: January 25, 1993
Finally submitted: September 17, 1992

Docket No. 91-7808

ROBERT SASSO and THEODORE KING, as Trustees of Local 282 International Brotherhood of Teamsters, Welfare, Pension and Annuity Trust Funds,

Plaintiffs-Appellees,

-v-

SALVATORE CERVONI,

Defendant-Appellant,

KEY WAY CONCRETE SUPPLY CORP.,

Defendant.

Before: FEINBERG, NEWMAN and CARDAMONE, Circuit Judges.

Appeal from the August 9, 1991, judgment and the August 11, 1992, supplemental order of the United States District Court for the Eastern District of New York (Jacob

Mishler, Judge) requiring defendant Cervoni to pay the Trustees of Local 282 International Brotherhood of Teamsters Welfare, Pension and Annuity Trust Funds.

Reversed.

Robert M. Ziskin, Commack, N.Y., submitted papers for defendant-appellant Cervoni and defendant Key Way Concrete Supply Corp.

Avram H. Schreiber, New York, N.Y., submitted papers for plaintiffs-appellees Sasso and King.

JON O. NEWMAN, Circuit Judge:

This appeal requires decision as to the circumstances under which a corporate officer is personally liable for employee trust fund contributions that should have been made by his corporation as required by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1988). The issue arises on an appeal by Salvatore Cervoni, the sole officer, director, and shareholder of Key Way Concrete Supply Corp. ("Key Way"), from the August 9, 1991, judgment and the August 11, 1992, supplemental order of the District Court for the Eastern District of New York (Jacob Mishler, Judge), requiring Cervoni to pay the Trustees of Local 282 International Brotherhood of Teamsters Welfare, Pension and Annuity Trust Funds $462,904.94. Because we conclude that Cervoni had no personal liability for the ERISA obligation of his corporation, we reverse.

FACTS

There is no dispute that Key Way, now bankrupt, became obligated by terms of a collective bargaining agreement and section 515 of ERISA, 29 U.S.C. § 1145 (1988), to make trust fund contributions. Nor is there any dispute that its delinquency was correctly determined to be $462,904.94. Judge Mishler ruled, relying on our decision in Leddy v. Standard Drywall, Inc., 875 F. 2d 383 (2d Cir. 1989), that Cervoni was equally obligated with his corporation for ERISA payments. When the appeal was here initially, we remanded for further findings, Sasso v. Key Way Concrete Supply Corp., 953 F. 2d 636 (2d Cir. 1991) (table), which have now been made. The District Court determined that Key Way terminated its payment to the Trust Funds because it was unable to satisfy its accounts receivable and that Cervoni declined to supply his corporation with sufficient capital to satisfy its outstanding obligations.

DISCUSSION

Appellees contend that the issue is whether ERISA's definition of "employers", 29 U.S.C. § 1002(5) (1988), should be given the same broad interpretation that courts have given to the term as used in section 3(d) of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 203(d) (1988). Applying the FLSA's definition, courts have imposed liability for a corporation's minimum wage obligations upon a corporate officer who was personally responsible for making (or not making) the required payments. See, e.g., Donovan v. Agnew, 712 F.2d 1509,

1510-11 (1st Cir. 1983). However, we agree with the First Circuit that the issue is not whether Cervoni falls within ERISA's definition of "employer" but whether he is an "employer who is obligated to make contributions to a multiemployer plan." 29 U.S.C. § 1145 (1988). See Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23, 24 (1st Cir. 1988).

Four circuits have now ruled that an individual is not liable for corporate ERISA obligations solely by virtue of his role as officer, shareholder, or manager. See International Brotherhood of Painters v. George A. Kracher, Inc., 856 F.2d 1546, 1547-48, 1550 (D.C. Cir. 1988); Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F. 2d at 25-26 (1st Cir.); Solomon v. Klein, 770 F. 2d 352, 354 (3d Cir. 1985); Operating Engineers Pension Trust v. Reed, 726 F. 2d 513, 515 (9th Cir. 1984). We agree with their interpretation of section 1145 for the reasons fully set forth by Judge Breyer in Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d at 25-26.

In prior decisions, however, we have recognized that special circumstances, beyond an individual's officer status or corporate duties, might warrant the imposition of personal liability for a corporation's ERISA obligations. Thus, in Lowen v. Tower Asset Management, Inc., 829 F. 2d 1209 (2d Cir. 1987), we held individual corporate officers liable for ERISA obligations upon evidence that they had acted in concert with fiduciaries in breaching fiduciary obligations, see id. at 1220, and had "intermix[ed]" assets of the corporation with assets of their own and of

related corporations and had used corporate assets for their personal benefit instead of for meeting ERISA obligations, see id. at 1221. Lowen relied both on the principle that a person "who knowingly participate[s] in fiduciary breaches may be liable under ERISA to the same extent as the fiduciaries," id. at 1220, and on the disregard of corporate form, id. at 1220-21, as indicated by its reliance on Alman v. Danin, 801 F.2d 1 (1st Cir. 1986), a decision the First Circuit regards as a veil-piercing case, see Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F. 2d at 27 (on rehearing).

In Leddy v. Standard Drywall, Inc., while explicitly declining to decide whether to equate individual liability standards under FLSA and ERISA, see 875 F. 2d at 387, we held a corporate officer liable for the ERISA obligations of his corporation where he had been convicted of engaging in a criminal conspiracy to defraud the funds owed contributions, see id. at 388.

We have recognized that an individual may in some circumstances be liable for knowingly participating in a fiduciary's breach of ERISA trust obligations, see Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 280 (2d Cir. 1992); Lowen v. Tower Asset Management, Inc., 829 F.2d at 1220, but a corporate employer does not have a fiduciary obligation to make trust fund contributions, see 29 U.S.C. § 1002(21)(A) (defining "fiduciary"), and a corporate officer's role in a company's failure to make such contributions is not automatically participation in a breach of fiduciary duties. The company's failure, of course, may breach its contractual obligations and thereby violate ERISA

requirements. In Diduck and Lowen, the individuals potentially or actually held liable for aiding fiduciary breaches were acting in concert with fiduciaries. See also Dardaganis v. Grace Capital Inc., 889 F.2d 1237, 1242-43 (2d Cir. 1989).

Though it remains for future decisions to demarcate the area of individual liability for corporate ERISA obligations, we are satisfied that nothing in the present record provides a basis for imposing personal liability upon Cervoni. He did not act in concert with a fiduciary to breach a fiduciary obligation, he did not commit fraud, and there is no claim and no basis in the record to support a claim that the corporate veil of Key West should be pierced on the theory that Cervoni is the corporation or its alter ego. His liability is sought to be established simply because of his dominant role in the affairs of a corporate employer. If individual liability for ERISA obligations is to be imposed on those in such a role, Congress must supply the remedy.

Accordingly, the judgment of the District Court is reversed.

APPENDIX A, Part 2

Decision of December 23, 1991

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of December, one thousand nine hundred and ninety-one.

PRESENT: Honorable Wilfred Feinberg,
Honorable Jon O. Newman,
Honorable Richard J. Cardamone,
Circuit Judges.

ROBERT SASSO and THEODORE KING, as Trustees of Local 282 International Brotherhood of Teamsters, Welfare, Pension and Annuity Trust Funds,

Plaintiffs-Appellees,

91-7808

-v-

SALVATORE CERVONI,

Defendant-Appellant,

KEY WAY CONCRETE SUPPLY CORP.,
Defendant.

ORDER

Appeal from the United States District Court for the Eastern District of New York (Jacob Mishler, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the case is remanded to the District Court for additional findings.

Salvatore Cervoni appeals from the August 9, 1991, judgment directing Key Way Concrete Supply Corp. ("Key Way") and appellant to pay to the Trustees of Local 282 International Brotherhood of Teamsters Welfare, Pension, and Annuity Trust Funds delinquent fund contributions. The appeal challenges Cervoni's personal liability for the delinquent payments. Before adjudicating that issue, we believe it would be helpful to have findings from the District Court as to the payments made to the Funds during 1989 and 1990 with respect to Key Way employees. Specifically, we request findings as to the dates and amounts of such payments, the person or entity making such payments, the reason or reasons why such payments ceased, and Cervoni's role in the decision to halt payments and his motivation for his actions. We expect the parties to cooperate to stipulate to undisputed matters so that the findings we request can be expeditiously made.

Upon the filing of the requested findings, appellant may resubmit the appeal to this Court by filing with

this Court a letter requesting resubmission and supplementing the joint appendix with the District Court's findings. Upon such resubmission, the appeal will be determined by this panel without further briefing.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT SASSO and THEODORE KING, as Trustees of Local 282 International Brotherhood of Teamsters, Welfare, Pension and Annuity Trust Funds,

Plaintiffs-Appellees,

-v-

SALVATORE CERVONI,

MEMORANDUM OF DECISION AND ORDER

August 6, 1991

Defendant-Appellant,

KEY WAY CONCRETE SUPPLY CORP.,

Defendant.

APPEARANCES:

AVRAM H. SCHREIBER, ESQ.
Attorney for Plaintiffs
11 Hanover Square
New York, NY 10005

ROBERT M. ZISKIN, ESQ.
Attorney for Defendants
6268 Jericho Turnpike,
Suite 12A
Commack, NY 11725

MISHLER, District Judge

Plaintiffs Robert Sasso and Theodore King, as Trustees of Local 282 International Brotherhood of Teamsters Welfare, Pension and Annuity Trust Funds ("Trustees") move for summary judgment and attorneys' fees pursuant to Fed. R. Civ. P. 56, and for a permanent injunction pursuant to Fed. R. Civ. P. 56.

BACKGROUND

Plaintiffs commenced this action to recover fringe benefit contributions from defendants Key Way Concrete Supply Corp. ("Key Way") and Salvatore Cervoni ("Cervoni"), pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, as amended, 29 U.S.C. §§ 1132 and 1145, in accordance with a Collective Bargaining Agreement. The Trustees claim defendants failed to pay the contributions owed to the Trustees for the period of February 23, 1989 through September 1990.

Defendant Key Way concedes that the amount of principal it owes plaintiff is $346,935.89. (Aff. of Robert M. Ziskin, Esq., attorney for defendants, dated 5/18/91 ¶3). Key Way also concedes it owes plaintiff $46,581.88 as interest, and $69,387.17 as liquidated damages pursuant to the Declaration of Trust and ERISA.

Key Way, however, contests plaintiffs' claim for attorneys' fees pursuant to article VI, section 3(b) of the Declaration of Trust. The Declaration of Trust provides that for claims over $500 the attorneys' fees are calculated by

taking 25% of the owed contributions plus interest.

Defendant Cervoni asserts that he is not personally liable for the unpaid contributions since he is not an employer under ERISA.

DISCUSSION

Summary judgment is proper when no material questions of fact remain to be decided by the factfinder and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986); Bay v. Times Mirror Magazine, Inc. No. 91-7089, slip op. 5589, 5595-96 (2d Cir. June 25, 1991). The nonmovant's evidence is to be believed, and all ambiguities and justifiable inferences to be drawn from the underlying facts should be resolved in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); General Elec. Co. v. New York State Department of Labor, No. 90-7672 slip. op. 6095, 6102-03 (2d Cir. June 28, 1991).

When the nonmovant bears the burden of proof on an issue, the movant can discharge the burden imposed by Rule 56 by showing that there is no proof to support the nonmovant's case. Celotex, 477 U.S. at 325, 106 S. Ct. at 2554. If the movant sustains its initial burden, the burden shifts to the nonmovant to produce evidence of a genuine issue of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

Defendant Cervoni as an Employer.

Section 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1145, imposes an obligation to make contributions to employee benefit funds on "every employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement." Cervoni argues that he is not an employer and, as a result, is not personally liable for Key Way's unpaid benefit-fund contributions. We disagree.

The Second Circuit Court of Appeals has harmonized the definition of employer used in section 515 of ERISA with the nearly identical language found in the Fair Labor Standards Act, 29 U.S.C. §203(d). Leddy v. Standard Drywall, Inc., 875 F. 2d 383, 387 (2d Cir. 1989). Because these statutes are designed to protect employees, a corporate officer with operational control who is directly responsible for a failure to pay statutorily required payments is an employer along with the corporation. Id. at 387-88.

Cervoni owns one-third of the outstanding shares of Key Way stock, is its president, signed the Collective Bargaining Agreement with Local 282 International Brotherhood of Teamsters on behalf of the corporation as its President, and signed the Declaration of Trust as "Employer" on behalf of Key Way. Cervoni also signed all the checks paid to plaintiffs for prior fringe benefit contributions (Cervoni Aff. dated 5/29/91 ¶¶ 1, 4, 6 & 7). As the corporate official of Key Way with operational control who is directly responsible for the failure to make the payments required by the statute, Cervoni is personally liable under

section 502 of ERISA, 29 U.S.C. §1132.

Attorneys' Fees

Plaintiffs cite no authority to support the claim that attorneys' fees should be calculated and awarded pursuant to a provision contained in the Declaration of Trust. In an action by a trustee to enforce an employer's obligation to make contributions to a multiemployer benefit plan in which judgment is entered in favor of the plan, the court shall award the plan "reasonable attorney's fees and costs of the action, to be paid by the defendant." 29 U.S.C. § 1132 (g)(2)(D).

We believe that in this case the reasonable attorneys' fees consist of the actual billings by plaintiffs' counsel. We find that counsel's hourly rate and expenditure of sixty and one-half hours on this action reasonable. Therefore, we award $8,743.42 as attorneys' fees, costs and disbursements.

CONCLUSION

Cervoni is personally liable to plaintiff for the amounts owed by Key Way. There is no genuine issue of material fact as to the sum of money owed to plaintiff by Key Way, the sum of $462,904.94. Plaintiffs are awarded attorneys' fees and costs in the amount of $8,743.42.

Plaintiffs motion for a permanent injunction is denied.[1]

IT IS SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of Robert Sasso and Theodore King, as Trustees of Local 282 International Brotherhood of Teamsters Welfare, Pension and Annuity Trust Funds and against defendants Salvatore Cervoni and Key Way Concrete Supply Corp. in the amount of $471,648.36 together with interest from December 15, 1990.

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[1]Plaintiff has not met the requirements set forth in the case it cited, Laborers Fringe, Etc. v. Northwest Concrete, Etc., 640 F. 2d 1350 (6th Cir. 1981). Plaintiff has failed to demonstrate that Key Way is a "recalcitrant employer" that has shown a persistent contempt for the judicial process. At this time there is no evidence that the Trustee's legal remedy is not adequate. Id. at 1352.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT SASSO and THEODORE KING, as Trustees of Local 282 International Brotherhood of Teamsters, Welfare, Pension and Annuity Trust Funds,

Plaintiffs,

-v- REPORT AND RECOMMENDATION
CV 90-1733(JM)

KEY WAY CONCRETE SUPPLY CORP., AND SALVATORE CERVONI

Defendants.

Plaintiffs Robert Sasso and Theodore King, as Trustees ("Trustee") of Local 282 International Brotherhood of Teamsters Welfare, Pension, and Annuity Trust Funds ("Fund"), have moved before District Court Judge Jacob Mishler for summary judgment and attorneys' fees pursuant to Fed. R. Civ. P. 56 and for a permanent injunction pursuant to Fed. R. Civ. P. 56. On August 6, 1991, plaintiffs [sic] motion was granted and judgment was awarded in the amount of $462,904.94. Plaintiffs were also awarded $8,743.42 for attorneys' fees, costs and disbursements. The court denied plaintiffs' motion for a permanent injunction. See Sasso v. Key Way Supply Corp., CV 90-1733 (E.D.N.Y. Aug. 6, 1991).

On appeal, the Second Circuit Court of Appeals remanded the case stating that

> it would be helpful to have findings from the District Court as to the payments made to the Funds during 1989 and 1990 with respect to Key Way employees. Specifically, we request findings as to the dates and amounts of such payments, the person or entity making such payments, the reason or reasons why such payments ceased, and Cervoni's role in the decision to halt payments and his motivation for his actions.

Sasso v. Cervoni, 91-7808 (2nd Cir. Dec. 23, 1991).

On January 28, 1992, the undersigned was referred the instant case to hold a hearing and to report and recommend on the issues which the Second Circuit requested findings of fact. Said hearing was held on April 29, 1992. At the conclusion of that hearing, the parties requested that they be permitted to submit proposed findings of fact and to stipulate to all undisputed matters. On June 5, 1992, counsel for both sides submitted (1) jointly stipulated findings of fact and (2) separate proposed findings of fact for all disputed matters.

At the hearing, the parties stipulated in writing that court exhibit 1 (Annexed as Appendix A hereto) is a schedule which reflects: (1) the months in 1989 and 1990 that employees worked for Key Way Supply Corp.; (2) the dates pursuant to the collective bargaining agreement that contributions were to be received by the Fund; (3) the dates remittance reports were submitted to the Fund indicating the amounts due and owing; (4) the amounts paid in connection

with each remittance report; and (5) the amounts outstanding based on each remittance report. See Hearing Transcript at pp. 5-6, dated Apr. 29, 1992.

In addition, the parties orally stipulated at the hearing that (1) when contributions were made to the Fund, they were made by Key Way Concrete Supply Corp.; (2) all contribution checks were drawn on the account of Key Way Concrete Supply Corp.; (3) the checks representing those contribution payments were signed by Salvatore Cervoni ("Cervoni"); and (4) beneath the signature line on each check was the wording "authorized signature." Hearing Transcript at pp. 10-11. The parties also stipulated that each month Key Way Concrete Supply Corp. was required to remit separate checks to the Welfare Fund, Pension Fund and Annuity Fund and that the sum of each of these amounts actually paid were reflected in column 4 in Appendix A annexed hereto. Hearing Transcript at p. 25.

In addition to checks for contributions to the various plaintiff funds, the above stipulations also apply to all other Key Way checks drafted in 1990. Hearing Transcript at p. 12.

On June 5, 1992, after the hearing, the parties both jointly stipulated to certain findings of fact and separately proposed other findings. Based on these submissions, the court finds the following:

KEY WAY CONCRETE CORP.

Key Way Concrete Supply Corp. ("Key Way"), formed in 1980, existed solely to supply labor to Long Island West ("LIW") and Riverhead Transit Mix ("Riverhead").

Key Way's total income in 1989 and 1990 was derived from monies attributed to supplying drivers of concrete trucks to Riverhead and LIW. Key Way neither manufactured nor sold concrete and did not own trucks, or other assets, at any time since it was first incorporated.

Cervoni was the President of Key Way since it was formed. In 1989 and 1990, Cervoni was the sole shareholder, officer and director of Key Way. He also managed and controlled the company. Cervoni was responsible for "supplying the payroll" for Key Way drivers. (P. ¶7; Tr. 18)[1]. However, Cervoni never put any capital into Key Way. (P ¶; Tr. 49). Under Cervoni's direction, all Key Way checks were written out by Key Way's bookkeeper.

Key Way continuously maintained the collective bargaining relationship with Local 282 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 282") on behalf of its drivers since approximately 1980. (Def. ¶1; Tr. 19). Cervoni was also the person who negotiated with Local 282 and dealt with the various Local 282 funds on behalf of Key Way. Key Way filed for bankruptcy in October, 1991.

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[1]All findings not cited to the transcript of the hearing, dated April 29, 1992, are statements of fact jointly stipulated to by and between the parties. Citations to "Plt. ¶" and followed by a number refer to specific findings of fact proposed by the plaintiffs which the court has adopted. Likewise, citations to "Def. ¶" and followed by a number refer to specific findings of fact proposed by the defendants which the court has also adopted.

RELATED ENTITIES

Riverhead and LIW are concrete manufacturers and suppliers. Riverhead predominantly does business in the area east of Rt. 100 in Suffolk County, New York. Cervoni was the sole shareholder, director, officer and manager (Plt. ¶1; Tr. 22) of Riverhead in 1989 and 1990. Riverhead filed for bankruptcy on July 15, 1991.

LIW did business in Nassau County and Eastern Queens in 1989 and 1990. Cervoni was the sole shareholder, officer, director and manager (Plt. ¶1; Tr. 47) of LIW in 1989 and 1990.

LIW, as times, used the trade name "Key Way" in billing customers. As a result, LIW customers, at times, paid money directly to Key Way, which was deposited in Key Way's bank account. Thus, on occasion, checks intended for Riverhead and LIW were drawn to the order of Key Way. These checks were used by Key Way for payroll purposes. (Def. ¶4; Tr. 46). In addition, LIW, which did not have a collective bargaining agreement with Local 282, used the name Key Way to perform work on union jobs in Nassau County. (Plt. ¶4; Tri. 45). LIW filed for bankruptcy in October 1991.

As users of Key Way's drivers, Riverhead and LIW were each obligated to pay monies to Key Way to cover its payroll, payroll taxes and fringe benefit contributions to Local 282. (Def. ¶3; Tr. 40).

At no time in the course of his performing duties on behalf of Key Way and LIW did Cervoni draw any salary. (Def. ¶¶17-18; Tr. 33). However, in connection with his duties on behalf of Riverhead in 1989, Cervoni drew a salary

of approximately five to six hundred dollars per week. (Def. ¶19; Tr. 19). Cervoni drew no salary from Riverhead in 1990 (Def. ¶ 19; Tr. 19).

Roanoke Sand and Gravel ("Roanoke") is a corporation whose stockholders included Cervoni, Mario Comelio, Robert Ross and others. Prior to 1989, Mr. Comelio and Mr. Ross were stockholders of Riverhead. When Roanoke was formed, Cervoni, Comelio and Ross personally guaranteed all purchases that Riverhead would make in the future from Roanoke. During 1989 and 1990, Riverhead made purchases from Roanoke.

In addition to Key Way, Riverhead used Suffolk II, another corporation owned by Cervoni, to supply and pay Riverhead's labor force. (Plt. ¶5; Tr, 65). Cervoni was the controlling officer of Suffolk II. (Plt. ¶5; Tr. 65). Suffolk II did not have a collective bargaining agreement with Local 282 (Plt. ¶5; Tr. 66) or any other union (Plt. ¶5 Tr. 110) and the labor supplied by it was "much cheaper labor" than the labor supplied by Key Way. (Plt. ¶5; Tr. 66).

CERVONI LOANS

In 1989 and 1990, Cervoni made loans to Riverhead and Key Way in the sum of $263,000.00. The decisions to make these loans and when to make them (Plt. ¶8; Tr. 39) were made by Cervoni. Moreover, when these loans were made to Riverhead, it was Cervoni's decision to make the loans to Riverhead rather than to Key Way. (Plt. ¶8; Tr. 58-61). Some of these loans were made to permit Riverhead to pay Key Way for its services rendered in providing drivers. (Def. ¶15; Tr. 39). These loans were made from Cervoni's personal checking account, or from a maintenance company Cervoni owned. There were no written agreements or

documentation regarding payments by Riverhead and LIW to Key Way for the labor Key Way supplied to Riverhead and LIW in 1989 and 1990. (Plt. ¶3; Tr. 39). In addition, Cervoni used businesses he owned (Cerbo and Mecca) to make loans to Riverhead. Further, in 1989, Mario Comelio also loaned money to Riverhead.

In July 1990, Roanoke issued dividends, each in the amount of $16,666.64, to Cervoni, Comelio and Ross. These dividends were credited to Riverhead on July 26, 1990, to reduce the amount Riverhead owed to Roanoke. These dividends were, in effect, a loan from Cervoni, Comelio and Ross to Riverhead.

CERVONI ENTITIES' FINANCIAL PROBLEMS

With regard to the years 1989 and 1990, Cervoni's intention with respect to Key Way was to try to pay the fund contributions due and owing to Local 282's Funds. (Def. ¶24; Tr. 35). Cervoni was not successful in this attempt.

With respect to the various personal loans made by Cervoni, such loans were made when the Riverhead bookkeeper indicated that she was desperate for money (Def. ¶25; Tr. 59) and from time to time such bookkeeper advised Cervoni that such loans were being deposited and utilized so that Key Way could make payments to Local 282's Fringe Benefit Funds. (Def. ¶25; Tr. 59). Cervoni made the decision as to who or what entity would receive payments.

In or about May of 1990, when Key Way had insufficient funds to cover its checks, Cervoni spoke with Local 282 Fund Representative Theresa Cody ("Cody") (Def. ¶7; Tr. 23) and inquired if she would permit Key Way to submit checks to the Local 282 Pension, Welfare and Annuity Trust

Funds on an individual basis rather than on a collective basis. (Def.¶7; Tr. 23). In response to Cervoni's aforementioned reqest, Cody replied that Key Way would be required to submit contribution payments simultaneously to each of the three Funds rather than submitting checks on an individual basis. (Def. ¶8; Tr. 23-24 and 27). In Cervoni's conversation with Ms. Cody, she stated that since certain contributions had been returned for insufficient funds Key Way would henceforth be required to submit certified checks to cover contributions. (Def.¶9; Tr. 23 and 27).

Cervoni decided to use Riverhead's available funds to "make payroll" and "buy cement and other materials to keep running" (Plt. ¶11; Tr. 28), rather than transfer a portion of those available funds to Key Way to make payments to the Local 282 Funds or to make federal and state withholding tax payments. (Plt. ¶11; Tr. 29).

In 1989 and 1990, Riverhead had difficulties in collecting payment for the concrete it sold and delivered. Riverhead gave mortgages to suppliers in 1989 and 1990 to get materials and cement. (Plt. ¶10; Tr. 30). In or about mid-1989, Riverhead and LIW's economic situation became such that it could not make payments to Key Way to cover the charges for drivers payroll, Federal and State taxes, Fund contributions and sales tax. (Def. ¶6; Tr. 41)

Within the period 1989 and 1990, both Riverhead and LIW's collection of monies due and owing or the sale of ready mixed concrete deteriorated (Def. ¶10; Tr. 28) and thus such companies were unable to timely pay Key Way for the services of its drivers. During this time, Riverhead had at least $3,000,000 in receivables.

Riverhead began to "dole out" to Key Way only

enough monies to cover its payroll so as to retain money to purchase cement and other materials to keep Riverhead operational. (Def. ¶11; Tr. 28). In or about 1989 and continuing into 1990, Riverhead continued to purchase materials and supplies on credit to keep the corporation operational. (Def. ¶16; Tr. 42).

Both Riverhead and Key Way owed the IRS money and were subject to tax liens in 1989 and 1990. Commencing in or about 1989, Federal and State tax liens amounting to some four to five hundred thousand dollars were imposed upon Key Way. (Def.¶13; Tr. 29). Commencing in or about 1989 and continuing through 1990, as Riverhead's financial situation deteriorated, Federal and State withholding sales tax liens were imposed on it and Riverhead was sued by various suppliers for non-payment of materials. (Def. ¶14; Tr. 29). LIW owed New York State money in 1990. Key Way paid $35,000 in 1990 to reduce delinquent payroll tax obligations for 1989. Cervoni caused Riverhead to repay him $50,000.00 in 1989 and 1990 due to certain personal loans previously made to Riverhead.

The following loan repayings were made to Cervoni in the period August 1990 to December 1990:

Month	Amount
August 1990	$ 2,500.00
October 1990	2,000.00
November 1990	10,057.17
December 1990	2,300.00

All of these loan repayments to Cervoni in the period August 1990 to December 1990 were made at a time that Key Way had ceased making payments to the Local 282 Funds

and owed money to the Local 282 Funds. (Plt. ¶12; Tr. 62-64). Cervoni made the decision to use Riverhead's available funds to make loan repayments to himself (Plt. ¶12; Tr. 65) rather than transfer that money to Key Way to pay outstanding obligations to the Local 282 Funds.

Key Way made contributions to the Local 138 Welfare Fund in January, 1990 by the following checks:

DATE	AMOUNT	PERSON COVERED	COVERAGE PERIOD
Jan. 5, 1990	$4,057.20	Cervoni	6/89
Jan. 10, 1990	$4,057.20	Lochrin	6/89
Jan. 11, 1990	$4,525.20	Carnevale	3rd Quarter 89
Jan. 16, 1990	$1,910.64	Gagliardi	not stated
Jan. 17, 1990	$4,525.20	Cervoni	3rd Quarter 89
Jan. 19, 1990	$4,057.20*	Comelio	2nd Quarter 89
Jan. 20, 1990	$4,525.20*	Comelio	3rd Quarter 89

Jan. 5, 1990	4,057.20	Cervoni	6/89
Jan. 10, 1990	4,057.20	Lochrin	6/89
Jan. 24, 1990	4,525.20	Lochrin	3rd Quarter 89
Jan. 26, 1990	4,525.20	Cervoni	4th Quarter 89
Jan. 29, 1990	4,525.20	Carnevale	4th Quarter 89
Jan. 30, 1990	4,525.20*	Comelio	4th Quarter 89
Jan. 31, 1990	4,525.20*	Lochrin	4th Quarter 89

The four checks indicated by asterisk were dishonored.

Between April 1990 and October 1990, Key Way made the following payments in addition to payroll and current payroll tax obligations:

DATE	PAYEE	AMOUNT
April	IRS delinquency Local 138 Local 1298 Suffolk II	$20,000.00 9,553.20 9,229.12 14,000.00
May	IRS delinquency	15,000.00
June	IRS delinquency Neconset Fire	20,000.00 400.00
July	IRS delinquency Suffolk II Local 1298 Local 138 Local 138	15,000.00 3,000.00 4,011.28* 12,570.20 4,525.20*
August	Local 1298	2,005.60*
September	Local 138	4,525.20*
October	Local 138 Local 1298	6,124.80 59.90

Notwithstanding its failure to make timely Fund contributions, Local 282 did not at any time withdraw its member drivers from their employment with Key Way nor did Local 282 take any other action to interfere or impede

Key Way's continued operation. (Def. ¶36; Tr. 109).

CONCLUSION

This court finds that the payments made by Key Way to the Local 282 Funds during 1989 and 1990 with respect to the Key Way employees and the dates and amount of such payments are set forth in Appendix A. The decision to make payments and to cease making the payments was made by Cervoni. In 1989 and 1990,
Cervoni was the sole shareholder, officer and director of Key Way. He managed and controlled the corporation. Payments to Local 282 Funds ceased because the corporation was unable to collect its account receivables and because Cervoni did not invest additional funds in Key Way or loan it additional monies. Instead, Cervoni used his resources in an attempt to support Riverhead, another corporation be managed and controlled. Finally, from funds accessible to Key Way, Cervoni elected to pay Key Way's past tax obligations and to continue his own health insurance coverage and similar coverage for Loughin, Carnevale and Comelio, persons who were neither employees nor officers of Key Way.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a copy to the undersigned within 15 days of the date of this report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e); Small v. Secretary of Health and Human Serv., 892 F.2d 15, 16 (2d Cir. 1989)(per curiam).

MICHAEL L. ORENSTEIN
United States Magistrate
Judge

Dated: July 9, 1993
Uniondale, New York

[SCHEDULE "A"]

MONTH & YEAR	DUE DATE	DATE REPORTED	AMOUNT PAID	AMOUNT OUTSTANDING
January 1989	March 15, 1989	May 5, 1989	$28,695.54	-0-
February 1989	April 15, 1989	June 5, 1989	20,813.26	-0-
March 1989	May 15, 1989	August 1, 1989 Welfare & Annuity August 14, 1989 Pension	31,228.45	-0-
April 1989	June 15, 1989	August 7, 1989	36,218.97	-0-
May 1989	July 15, 1989	September 5, 1989	44,871.72	-0-
June 1989	August 15, 1989	October 5, 1989	34,354.15	-0-
July 1989	September 15, 1989	November 3, 1989	36,941.37	-0-
August 1989	October 15, 1989	December 7, 1989	52,104.95	-0-
September 1989	November 15, 1989	January 9, 1990	38,739.75	-0-
October 1989	December 15, 1989	February 15, 1990	41,492.28	-0-
November 1989	January 15, 1990	March 12, 1990	57,591.44	-0-
December 1989	February 15, 1990	April 23, 1990	-0-	$28,470.85

[SCHEDULE "A"]

MONTH & YEAR	DUE DATE	DATE REPORTED	AMOUNT PAID	AMOUNT OUTSTANDING
January 1990	March 15, 1990	Checks bounced and not replaced May 7, 1990	-0-	25,360.16
February 1990	April 15, 1990	Checks bounced and not replaced July 30, 1990	-0-	16,327.79
March 1990	May 15, 1990	July 30, 1990	-0-	21,022.09
April 1990	June 15, 1990	July 30, 1990	-0-	26,938.19
May 1990	July 15, 1990	July 30, 1990	-0-	42,977.38
June 1990	August 15, 1990	May 23, 1991	-0-	40,268.03
July 1990	September 15, 1990	March 1, 1991	-0-	38,228.30
August 1990	October 15, 1990	March 1, 1991	-0-	41,271.20
September 1990	November 15, 1990	March 1, 1991	-0-	31,436.96
October 1990	December 15, 1990	January 24, 1991	-0-	38,800.87
November 1990	January 15, 1991	January 24, 1991	-0-	28,363.60
December 1990	February 15, 1991	January 24, 1991	-0-	18,391.36

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT SASSO and
THEODORE KING, as Trustees of the Local 282 International Brotherhood of Teamsters Welfare, Pension and Annuity Trust Funds,

CV-90-1733

Plaintiffs,

-V-

MEMORANDUM AND DECISION AND ORDER

KEY WAY CONCRETE SUPPLY CORP. and SALVATORE CERVONI,

Defendants.

APPEARANCES:

AVRAM H. SCHREIBER, ESQ.
Attorney for Plaintiffs
11 Hanover Square
New York, NY 10005

ROBERT M. ZISKIN, ESQ.
Attorney for Defendants
6268 Jericho Turnpike, Suite 12A
Commack, NY 11725

MISHLER, District Judge

Plaintiffs Robert Sasso and Theodore King, as Trustees of Local 282 International Brotherhood of Teamsters Welfare, Pension and Annuity Trust Funds ("Trustees"), commenced this action to recover fringe benefit contributions from defendants Key Way Concrete Supply Corp. ("Key Way") and Salvatore Cervoni ("Cervoni"), pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, as amended, 29 U.S.C. §§ 1132 and 1145, in accordance with a Collective Bargaining Agreement. The Trustees claim defendants failed to pay the contributions owed to the Trustees for the period of February 23, 1989 through September 1990.

On August 6, 1991, we granted summary judgment in favor of the Trustees in the amount of $462,904.94. Sasso v. Key Way, No. 90-1733, slip op. at 6 (E.D.N.Y. August 6, 1991). However, the Second Circuit Court of Appeals remanded the case stating that:

> it would be helpful to have findings from the District Court as to the payments made to the Funds during 1989 and 1990 with respect to Key Way employees. Specifically, we request findings as to the dates and amounts of such payments, the person or entity making such payments, the reason or reasons why such payments ceased, and Cervoni's role in the decision to halt payments and his motivation for his actions.

Sasso v. Key Way, No. 91-7808, slip op. at 1 (2d Cir. December 23, 1991).

On January 28, 1992, we referred this matter to Magistrate Judge Michael L. Orenstein for a Report and Recommendation pursuant to 28 U.S.C. § 636(B). For the reasons stated herein, the Report and Recommendation is adopted in part and modified in part.

FACTUAL FINDINGS

1. THE DATES AND AMOUNTS OF PAYMENTS MADE TO THE TRUST FUNDS DURING 1989 AND 1990.

The dates and amounts of payments made to the Trust Funds are outlined in Appendix A of the Report and Recommendation.

2. THE PERSON OR ENTITY MAKING PAYMENTS TO THE TRUST FUNDS

The payments to the Trust Funds were made by Key Way. All of the checks were signed by Cervoni.

3. THE REASON OR REASONS WHY THE PAYMENTS TO THE TRUST FUNDS WERE DISCONTINUED

The payments to the Trust Funds terminated because: (1) Key Way was unable to satisfy its accounts receivable; (2) Cervoni failed to supply Key Way with sufficient capital to satisfy its outstanding obligations; (3) Cervoni used his remaining assets to finance Riverhead Transit Mix,

insurance coverage and similar coverage to Amato Carnevale, Mario Comelio and Robert Lochrin, non-Key Way employees, rather than fulfilling his obligations to the Trust Funds.

4. CERVONI'S ROLE IN THE DECISION TO HALT PAYMENTS TO THE TRUST FUNDS

As the sole shareholder, officer and director of Key Way, the decision to stop making payments to the Trust Funds was made by Cervoni.

OBJECTIONS[2]

1. Defendants' Objections

We have reviewed defendants' objections to the Report and Recommendation and find them to be without merit. The Defendants object to those portions of the report that make any reference to the related entities controlled by Cervoni. The Report and Recommendation delves into these related entities for the purpose of discovering "the reason or reasons why ... [the Trust Fund] payments ceased, and Cervoni's role in the decision to halt payments and his motivation for his actions." Sasso v. Key Way, 91-7808, slip op. at 1 (2d Cir. December 23, 1991). Therefore, the findings were in accordance with the Second Circuit's instructions.

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[2] Pursuant to Fed. R. Civ. P. 72(b), a decision by a Magistrate Judge on a dispositive matter shall be reviewed de novo by the district court if any objections to the decision are submitted.

why ... [the Trust Fund] payments ceased, and Cervoni's role in the decision to halt payments and his motivation for his actions." Sasso v. Key Way, 91-7808, slip op. at 1 (2d Cir. December 23, 1991). Therefore, the findings were in accordance with the Second Circuit's instructions.

2. Plaintiffs' Objections

The plaintiffs object to the first paragraph on Page 11 of the Report which states:

> Notwithstanding its failure to make timely Fund contributions, Local 282 did not at any time withdraw its member drivers from their employment with Key Way nor did Local 282 take any other action to interfere or impede Key Way's continued operation.

This objection is sustained. The remand order from the Second Circuit directed this court to make findings of fact concerning the activities of Key Way and Cervoni and their contributions to the Trust Funds. The paragraph referring to the action/inaction of Local 282 is not responsive to the remand order and is stricken from the Report and Recommendation.

Plaintiffs also argue that the Report and Recommendation should have stated that "[d]efendant Salvatore Cervoni was responsible for the day-to-day operation of Key Way Concrete Supply Corp." (Plaintiffs' Memo. p. 1). This objection is also sustained. Cervoni admitted in his affidavit opposing the motion for summary judgment that:

> [a]t all times material herein and for at least the past year, I have been responsible for directing the day-to-day affairs of Key Way.

(Cervoni's Affidavit in Opposition to Summary Judgment ¶6.). The Report and Recommendation is amended to include the fact that Cervoni was responsible for directing the day-to-day affairs of Key Way.

There is no factual basis to support plaintiffs' argument that Cervoni was notified by the IRS that he was personally liable for Key Way's unpaid income taxes and that he directed Key Way not to file bankruptcy until October 1991. These objections are overruled.

ORDER

The Report and Recommendation is modified so as to delete the first paragraph on Page 11 which refers to Local 282 and to include the fact that Cervoni was responsible for the day-to-day operations of Key Way. The Report and Recommendation is an [sic] all other respects adopted by this court.

SO ORDERED.

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U.S.D.J.

Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

No. 92-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL BOURGAL, JOHN PROBEYAHN, BEN CIAVOLELLA, JR., IANIELLO MADONNA, THEODORE KING, CHESTER BROMAN, FRANK FINKEL and JOSEPH FERRARA, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Petitioners,

vs.

SALVATORE CERVONI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT M. ZISKIN
Attorney for Respondent
6268 Jericho Turnpike
Commack, New York 11725
(516) 462-1417

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Under what circumstances, if any, is a Corporate Officer personally liable for employee trust fund contributions that should have been made by the Corporation as required by the Employee Retirement Income Security Act of 1974?

2. Whether the Second Circuit correctly applied the well-established choice of law to the particular facts of this case, in holding that the Corporate Officer had no personal liability for the ERISA obligation of the Corporation?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	v
THE OPINIONS BELOW	vii
PARTIES	vii
STATUTES INVOLVED	vii
BRIEF	1
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
CONCLUSION	6

TABLE OF CITATIONS

Cases	Page
Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F. 2d. 23	3, 4
Employee Retirement Income Security Act 29 U.S.C. Section 1002(5)	vii, 3, 4, 5
29 U.S.C. Section 1145	vii, 3, 4, 5

OPINIONS BELOW

The opinions below are set forth in the Appendices to Petitioners' Petition for Writ of Certiorari.

PARTIES

The caption of the case in this Court contains the names of the present Trustees and Fiduciaries of the Local 282 Welfare, Pension and Annuity Trust Funds.

The parties to the proceedings in the District Court and in the United States Court of Appeals for the Second Circuit were Robert Sasso and Theodore King, named Trustees. Salvatore Cervoni, the sole shareholder, officer and director of Key Way Concrete Supply Corp., was the sole defendant in the proceedings before the Second Circuit Court of Appeals.

STATUTES INVOLVED

Section 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. Section 1145, states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 3(5) of ERISA, 29 U.S.C. Section 1002(5), states:

> The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

Section 3(9) of ERISA, 29 U.S.C. Section 1002(9), states:

> The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization.

No. 92-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL BOURGAL, JOHN PROBEYAHN, BEN CIAVOLELLA, JR., IANIELLO MADONNA, THEODORE KING, CHESTER BROMAN, FRANK FINKEL and JOSEPH FERRARA,
as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Petitioners,

vs.

SALVATORE CERVONI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Local 282 International Brotherhood of Teamsters, Welfare, Pension and Annuity Trust Funds are multiemployer benefit plan trusts organized and operated in accordance with the Employee Retirement Income Security Act of 1974,

("ERISA"). They are jointly administered by representatives of employers and employees engaged in commerce. Such funds provide fringe benefits to employees performing services within the trade and geographical jurisdiction of Local 282 of the International Brotherhood of Teamsters (Local 282).

Key Way Concrete Supply Corp. ("Key Way") is a corporation which maintains its place of business in St. James, New York, where it is engaged in the sale of ready mixed concrete.

Salvatore Cervoni is the sole officer, director and shareholder of Key Way.

During the course of its business operations, Key Way became obligated by the terms of the collective bargaining agreement to make trust fund contributions to the Local 282 Welfare, Pension and Annuity Trust Funds.

As alleged in Petitioners' complaint and amended complaint, Key Way became indebted to such trust funds for unpaid fringe benefit contributions covering the period February 23, 1989 through July of 1990.

Neither Petitioners' complaint nor amended complaint alleged that Cervoni or any other corporate officer or official or representative of Key Way engaged in any fraudulent activities of any kind with respect to the operation of Key Way and/or with respect to the payment of fringe benefit contributions. Likewise, neither the complaint nor amended complaint in any manner alleged any factual basis which would warrant a Court to "pierce the corporate veil" so as to place personal responsibility for the non-payment of fringe benefit contributions upon Cervoni.

The collective bargaining agreement signed by Key Way with Local 282 did not provide that corporate officers, agents or representatives would become personally liable in a situation where the corporation failed to make timely payments of fringe benefit contributions. Neither by the terms of the collective bargaining agreement or by any other instrument

did Cervoni agree to guarantee Key Way's payments to the fringe benefit funds. Likewise, the provision of the fund trust indentures do not impose liability upon corporate officers of those corporations who fail to make timely contributions to the benefit funds.

Although it is undisputed that Key Way failed to make fund contributions during the months of February through July of 1990 while continuing to operate its ready mix business and employ drivers, neither Local 282 nor Petitioner took any affirmative steps to prevent Key Way from steadily increasing its mounting trust fund obligations.

REASONS FOR DENYING CERTIORARI

Petitioners present no conflict of interest among the circuits or between the Federal Circuit's decisions and a decision of a State Court of last resort; nor is there any State Court decision involved.

To the contrary, the Second Circuit's decision in this case joins the six other Circuit Court of Appeals to have addressed this issue.

Essentially, the Second Circuit's decision in this case is limited to the facts set forth therein, and it is highly unlikely that a case such as this will arise again.

In the circumstances of the instant case, Petitioners have sought to convince this Court as well as the Court below that a broad interpretation should be given to ERISA's definition of "employer", 29 U.S.C. Section 1002(5).

The Second Circuit specifically adopted the reasoning of the First Circuit and concluded that "the issue is not whether Cervoni falls within ERISA's definition of 'employer', but whether he is an 'employer' who is obligated to make contributions to a 'multiemployer plan'."

Specifically, the Second Circuit adopted the reasoning of Judge Breyer in *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F. 2d. 23 at 25-26 which held:

> . . . The statute's language clearly states that the duty in Section 1145 arises only with respect to 'employers obligated' to make contributions. Although

> Starrett's corporation may have been 'obligated' to make the contributions, Starrett personally was not. For another thing, the legislative history of Section 1145 indicates that the language means what it says. When Congress enacted the provisions in 1980, the Senate Committee on Labor described it as follows:
>
> The public policy of this legislation . . . mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal Statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans.

Having traced the history of the Multiemployer Pension Plan Amendments Act of 1990, the Court of Appeals for the First Circuit in *Starrett Paving*, *supra*, at page 25 went on to hold:

> One who would be obligated to make a payment in the absence of ERISA might be one 'already obligated', but one who, like Starrett, has no such prior, independent obligation is not.

In its further consideration of Section 1145 and 1002(5), the First Circuit at pages 25 and 26 set forth the following relevant factors in connection with its interpretation of Section 1002(5) and Section 1145.

01. That as an employer is not contractually obligated to contribute to a plan once the relevant collective bargaining agreement has expired, Section 1145 does not permit a plan to sue for contributions. In this regard the Court concluded that Section 1145's thrust was to permit a plan to sue for contractually obligated delinquent contributions as opposed to suing with respect to an employer's statutory obligations.

Additionally, the First Circuit observed that a literal reading of the broad definition of the word "employer" found in Section

1002(5) in relationship to Section 1145 would nevertheless make a substantial difference in connection with an analysis of other provisions of ERISA. Thus, it was concluded that a literal reading of the definition of "employer" would not render meaningless its broad definition as found in Section 1002(5).

02. With regard to the concern that a literal reading of Section 1145 would not permit corporate veil piercing, the Court held "when State Law pierces the corporate veil where the owner is the corporation's alter ego where State or other relevant Federal Law makes the owner liable, it is fairly easy to say that the owner is the corporation and that the owner is therefore an "employer" (under ERISA's definition) "who is obligated" "to make contributions to" a pension plan.

With regard to the contention that like the Fair Labor Standards Act ("FLSA"), ERISA aims to protect workers by securing the payments due them, the Court observed that "an ERISA-type fund" is not necessarily as helpless when faced with a financially shaky, but closely held, corporation as is a worker seeking payment of a minimum wage. In this connection the Court concluded that a worker entitled to ERISA protected pension fund payments may find it easier through his/her Union to secure a written promise of personal liability from the owner of a shaky corporation.

In any event, the First Circuit concluded that the "general considerations of need" did not carry it "beyond the statute Congress wrote."

In response to the contention that a literal interpretation of Section 1002(5) does not render the statute meaningless, the First Circuit observed that the definition still applies to other parts of ERISA. In this regard the Court observed "as we have also pointed out, even if the class of persons liable under Section 1145 is the same as those already liable under State (or some other) law, Federal liability means easier collectibility because of ERISA provisions for, e.g., attorneys' fees, liquidated damages and interest. Thus the Court held that it must interpret the statute in accordance with its 'plain meaning'."

The Court of Appeals for the Second Circuit aptly stated . . .

> "as it remains for future decision to demarcate the area of individual liability for corporate ERISA obligations, we are satisfied that nothing in the present record provides a basis for imposing personal liability upon Cervoni. He did not act in concert with a fiduciary to breach a fiduciary obligation, he did not commit fraud, and there is no claim and no basis in the record to support a claim that the corporate veil of Key Way should be pierced on the theory he *is* the corporation or its alter ego. His liability is sought to be established simply because of his dominant role in the affairs of a corporate employer. If individual liability for ERISA obligations is to be imposed on those in such a role, Congress must supply the remedy."

CONCLUSION

For all of the foregoing reasons, Certiorari should be denied.

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Respectfully submitted,

ROBERT M. ZISKIN
Office and P.O. Address:
6268 Jericho Turnpike, Suite 12A
Commack, New York 11725
(516) 462-1417

Attorney for Respondent